INDEX

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

Page

OTHER CITATIONS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1180

OLD DOMINION BRANCH NO. 496, NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, *Appellants,*

v.

HENRY M. AUSTIN, L. D. BROWN, and ROY P. ZIEGENGEIST, *Appellees.*

On Appeal from a Judgment of the Supreme Court of Virginia

BRIEF FOR THE APPELLEES

HENRY M. AUSTIN, L. D. BROWN, and ROY P. ZIEGENGEIST, file this brief in opposition to Appeal by Appellants from Judgment of the Supreme Court of Virginia.

JURISDICTION

Jurisdiction to review the decision below is as stated in Appellants Brief.

STATUTE AND EXECUTIVE ORDER INVOLVED

This is stated in Appellants Brief.

QUESTIONS PRESENTED

1. Whether *Linn* v. *Plant Guard Workers*, 383 U. S. 53 (1966), precludes, as a matter of national labor policy, a state court award of defamation damages for a statement published in a local union newspaper which accurately identifies certain employees as "scabs" and defines "scab" in pejorative terms.

2. Whether a damage award based upon the aforesaid publication is barred by the First and Fourteenth Amendments to the Constitution of the United States.

3. Whether a state statute which, as authoritatively construed, makes "insulting words" actionable, without a showing of immediate danger of breach of the peace, if the words are uttered with "actual malice," defined as hostility, is unconstitutionally overbroad and void for vagueness.

4. Whether three separate awards of $55,000.00 each of compensatory and punitive damages, for publishing the statement in question, is "excessive" within the meaning of *Linn*, *supra*, 383 U. S. at 65-66.

STATEMENT

A. The Facts

The Appellants brief presents only a limited statement of the facts and Appellees present in addition a more comprehensive statement of what transpired.

The Appellees, Henry M. Austin, L. D. Brown, and Roy P. Ziegengeist, were postal carriers of the Richmond, Virginia post office. None of the Appellees were members of the Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO (hereinafter referred to as "Union".), having elected not to become members. They were not required to join "Union" under Executive Order 11491. The Virginia Right To Work Law also gave them the right to decide whether or not they would join. There were no racial overtones or discrimination of any kind involved in what transpired; both Austin and Brown being black and Ziegengeist caucasian. On two occasions preceding the libelous publication which is the subject of this action the name of the Appellee, Henry M. Austin, was printed in the Local Branch Newsletter "Carriers Corner" under a list of "Scabs". (A.39) The Appellee, L. D. Brown's name was published once as a "Scab". (A.48) After the second publication of his name, Austin, protested this to the Postmaster of the Richmond Post Office stating that coercion was being used to force him to join the "Union" and that he thought management should be advised that coercion was being used on members of the Richmond Post Office in violation of guarantee of the Federal Government that employees in the post office did not have to join "Union". (A.39) He also talked with the President of the Local Branch of the "Union", and expressed his concern about his name being printed, stating he did not know what a "scab" was but that he would sue the next official of "Union" who called him a "scab" as well as the whole "Union". In response to these complaints made in advance of the libelous article he was informed by the President that this was one of the tools used by "Union" against carriers who had a chance to join "Union" and had not done so and that there was nothing the Postmaster could do about it. He was further informed that the

only way he could stop it would be by joining the "Union". He was further told there was nothing he or the Postmaster could do to stop the printing. (A. 40, 41) Several weeks after this complaint to the "Union" President, the libelous article concerning the Appellees was printed in "Carriers Corner" and posted on at least one bulletin board at one sub-station. This Article is set forth in Appellants Statement of Facts, (p. 4, 5) (A. 72). Underneath the Article the three Appellees were listed by name as "scabs".

> "The Scab
>
> Some co-workers are in a quandary as to what a scab is; we submit the following: After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a *scab*.
>
> A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.
>
> When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.
>
> No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.
>
> Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.
>
> Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was

a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class.

List Of Scabs

Henry Austin	Richard Leonard
Lewis Bolton	F. E. Moriconi
E. D. Brown	Judson Proctor
L. D. Brown	Wilford Tevis
R. L. Broughman	Hunter Whitlock
R. L. France	R. L. Worsham
Roger Hanson	R. P. Ziegengeist"
Randolph Jacobs	

The calling of Appellees "Scabs" is not the subject of the suit for libel but the libelous Articles printed of and concerning them, which held them up to ridicule by their fellow employees and attributed to them, lack of character, rotten principles and of being traitors to God, Country, Family and Class. While "Union" contended the Article was mere hyperbole and that no one would have taken same seriously, yet the President of the Local, Lawrence Hutchins testified he did not know whether the Appellees had rotten principles (A. 34) and the Secretary Angelo Parker, testified that he thought the Appellees principles should be questioned and that he felt they had rotten principles. He further testified that the purpose of the publication concerning Appellees was to let people know what is going on. (A. 37). The President of the Local also testified that the derogatory statements were published so that fellow employees would stop associating with them (A. 57) and to persuade Appellees to join the "Union" (A. 58). Kenneth Fiester, President of the International Labor Press Association, testified that the libelous article had been printed so many times in labor publications over the past 30 years that he could not say how many. Under cross examination, however, he admitted that in the entire 30 years he had never seen

this article appear listing certain persons named as individuals. (A. 53).

Counsel for "Union" stipulated that "Union" had not apologized and had not authorized an apology and did not offer any at the trial. (A. 36). President of "Union" testified that the Article was published as a figure of speech and he could not say whether they were traitors, had rotten principles or any of the characteristics published of them. (A. 34).

Austin had been employed at Richmond Post Office for 14 years and never had any troubles with his fellow employees. Brown and Ziegengeist had been employed 13 and 12 years respectively and never had problems with their fellow workers until after the libelous publication. Austin testified that after the article was printed the other carriers with whom he previously had good relationships stopped associating or speaking to him and that he has been working in a hostile atmosphere; that on two occasions at social gatherings he was referred to as being the "Scab" they were talking about; that he began to have migraine headaches and had to go to the emergency room at The Medical College of Virginia Clinic and his trouble was diagnosed as tension and nervousness; and he lost quite a lot of time, sometimes as much as 2 or 3 days at a time, from work because of working under hostile atmosphere. (A. 42, 43). Austin's testimony indicated he was a man of strong convictions and of high principles. It was these principles and convictions which persuaded him not to join "Union". Appellee, Ziegengeist testified that he had enjoyed good relationship with his fellow workers prior to the publication, and that thereafter they became cool to him, his wife was distraught, that he was harrassed by "Union" representatives. His daughter testified that this had been upsetting and they were all scared of what might happen to them. (A. 43, 45, 46, As la, lb). Ziegengeist was a dedicated employee of high principles who worked on top of the clock, extra time, believing in an honest days work for a days pay. Undoubtedly his reasons for not joining

"Union" stemmed from his high principles in giving the U. S. Government a full days work and his practice of working 15 to 30 minutes a day extra, off the clock for which he was not paid; a practice strongly and vehemently opposed by "Union" who condemned him in the strongest terms for giving extra work to the U. S. Government. Appellee, Brown testified that the libelous publication was posted on a bulletin board at his station and came to his attention; that he had been upset and nervous ever since the libelous article was published, suffered from headaches, and that he had to work in a hostile atmosphere as a result of the article and his associates made jokes and called him different names. (A. 47, 48, 49, As 2a).

Executive Order 11491 specifically provides that each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal to refrain from joining a labor organization. It further provides that the head of the Agency shall assure that no interference, restraint or coercion is practiced within his agency to encourage or discourage membership in a labor organization. (J. S. 12a-33a).

B. The Proceedings In The Trial Court

This is set out in Appellants Brief and in the Appendix.

C. The Decision Below

This is set out in Appellants Brief and in the Opinion of Supreme Court of Virginia.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case the individual judgment awarded each of Appellees totals $55,000.00, that is $10,000.00 compensatory and $45,000.00 punitive damages. The Appellees are three letter carriers and represent only a handful of carriers who had not joined the local "Union".

At the time of publication of the libelous article there was no labor dispute involved as such, no violence, no picketing, no disturbance of any kind. There was nothing involving Appellees publicly or otherwise, and no public interest or concern as to any organizing campaign by "Union". They were three individual letter carriers who had decided as a matter of principal not to join "Union". They had never been involved publicly in any way and there was no publicity of any kind involving their decision not to join "Union". In fact in so far as the public was concerned they were completely unknown. Their names have never, prior to suit, been published in any context relating to their employment. They enjoyed a friendly and cooperative relationship with their fellow employees for a period of 12 to 14 years.

The use of the word "Scab" in reference to the Appellees is not the subject of the suit for libel. "Union" contends that all that was involved was informing Appellees' fellow workers that they were not "Union" members, however, this could have been accomplished by publishing a list of non union members if "Union" so desired. That was not the purpose of the publication, as "Union" had already published Austin's name twice as a "Scab" (non-member) and Brown's name once. Throughout the trial and appeals Appellants contend that the language used was such that no one would have taken same seriously, meaning that Appellants were aware that such statements of Appellees were false but were issued as a figure of speech believing no one would take same seriously.

The defamatory publication, the subject of the libel suit, was made after the Appellee Austin had protested to the Postmaster and to the President of the Local that coercion was being used to compel non "Union" members to join "Union". This was certainly a form of coercion from which it would appear workers were protected by the Executive Order.

The libelous publication was made by "Union"

he foregoing complaint for the admitted purpose of
ng pressure upon Appellees to compel them to join
n", that is to let Appellees fellow workers know what
f persons "Union" considered them to be so that
workers would not associate with them.

The publication which "Union" attributes to Jack
n has been widely circulated in Labor Organizations,
er, according to a "Union" witness it has never in 30
been published with reference to specific individuals
oned by name. The article which "Union" says is
hyperbole attributes to Appellees and conveys to the
that Appellees not only were traitors but men of
ow character and rotten principles that they should
pised by their fellow workers.

It strains the concept of freedom of speech out
proportion to say that such language is and should
tected under the First Amendment. The libel was
ued under any situation of emotional stress by
n" but was coldly, and deliberately issued with
lated purpose of harming Appellees in their work
induce fellow workers not to associate with them.
rd to conceive of a clearer case of maliciousness
its publication.

It is the contention of "Union" that all that
lved here is free speech protected under the First
urteenth Amendments. It being their contention
e law tolerates such language as was used here, in
hey term a labor dispute.

This Court in *Linn* v. *Plant Guard Workers*, 383
3 (1966) dealt at length with the problems arising
bel and slander in a labor dispute and concluded
61:

> "In sum although the Board tolerates intemperate, abusive and inaccurate statements made by the Union during attempts to organize the employees it does not interpret the act as giving either party license to injure the other inten-

tionally by circulating defamatory or insulting materials known to be false."

Unless the rights of individual workers as spelled out in *Linn, supra,* are preserved such individuals would be placed at the mercy of Union without any protection under state right to work laws and without any means of redressing defamatory assaults upon their character. Unions while very necessary in the protection of workers can also become mean and vicious in their attitude and actions towards workers who elect not to become members. Unions have become monolithic in size and an individual worker singly is almost helpless to combat any abuses committed by them. A deterrent to abuses by Union is absolutely necessary if the rights of the individual to make his own decision is to be preserved.

The extent to which state libel laws have to yield to the constitutional protection of freedom of speech and the press was first considered in *New York Times* v. *Sullivan,* 376 U. S. 254, holding that in an action by a public official against a newspaper there can be no recovery unless the defamatory falsehood was made with actual malice - that is with knowledge that it was false or with reckless disregard of whether it was false or not. In *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130 the rule as to public officials was broadened to include "public figures". In *Rosenbloom* v. *Metromedia Inc.* 403 U. S. 29, the rule as to "public officials" and "public figures" was broadened to include a private individual where the statement in a radio broadcast concerned an issue of "public or general interest".

The Appellees were not "public officials" not "public figures" and whether or not they joined the "Union" was not a matter of public or general concern. Hence under the *Linn* holding they were entitled to recover upon a showing that the defamatory statements were circulated with malice and caused them damages. As is indicated it is difficult to envision a case where malice was more clearly shown than as here where the defamatory statement was published recklessly in disregard of Appellees rights and

without regard as to whether same were true or not following protest by one of the Appellees and published for the admitted purpose of inducing fellow employees not to associate with non members. Damages were proved by each of the Appellees including alienation of associates (one of the elements specifically mentioned by this Court in *Linn*), injury to reputation, mental stress and suffering and loss of time from work and medical cost.

ARGUMENT

I. APPELLANTS ASSERT THE COURT BELOW ERRED IN HOLDING *NEW YORK TIMES* INAPPLICABLE

A. Appellants Assert The Court Below Misread *Linn*

It is the contention of Appellants that the Court below misread *Linn* and that the decision of the Supreme Court of Virginia is in irreconciliable conflict with *Linn*. Their contention is based upon certain portions of the *Linn* opinion citing *Cafeteria Union* v. *Angelos*, 320 U. S. 293, 295 (1943) in which it is stated that labor disputes being heated affairs where charges, counter charges, unfounded rumors, vituperations, personal accusations, etc., are common place. The Court noted in *Linn* at page 58 that it is necessary to determine whether libel actions in such circumstances might interfere with the National Labor policy, and at page 61 observed that while a certain amount of intemperate and abusive statements are tolerated it does not interpret the National Labor Relations Act as giving either party a license to injure the other intentionally. At page 63 it is observed that malicious utterance of defamatory statements in any form cannot be condoned, and Unions should adopt procedures calculated to prevent such abuses. It is pointed out that the National Labor Relations Board can award no damages, impose no penalty, nor give any other relief to the defamed individual, while state remedies have been designed to compensate the victim and enable him to vindicate

his reputation.

The decision in *Linn* contrary to Appellants assertions observes that free speech in a labor organizing campaign does not permit the unprovoked infliction of personal injuries and that damages for personal injuries may be assessed without regard to the merits of the labor controversy. The Court then to minimize the consequences so that legitimate state interest would not interfere with the National Labor Policy at pg. 64 limited the availability of state remedies in the following language:

> "We therefore limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage." *Linn* v. *Plant Guard Workers,* 383 U. S. 53, at 64.

The Court then goes on to say that the standards enunciated in *New York Times Co.* v. *Sullivan* 376 U. S. 254 (1964) are adopted by analogy rather than by constitutional compulsion. According to Blacks Law Dictionary "Analogy" does not mean identity but implies a difference or the similitude or relations which exist between things compared, such as recourse to cases on a different subject matter, but governed by the same general principle. The Malice test in *Linn* pg. 65 was applied to effectuate the statutory design with respect to pre-emption.

That the Supreme Court of Virginia in the decision below correctly interpreted *Linn* is apparent from the dissenting opinion of Mr. Justice Fortas with whom the Chief Justice and Mr. Justice Douglas join. The dissenting opinion states that the holding of the majority in *Linn*, pg. 70, is as follows:

> "* * * the Court today holds that Petitioner perceiving himself the target of purportedly false and defamatory statements may sue Union and several of its officers for damages - - so long as he pleads that the statement is defama-

> tory, was made with malice and caused some injury to him. Should he succeed in clearing the hurdles set in his path, he may recover not only compensation for his "injuries" but punitive or exemplary damages as well."

The dissent at page 70 comments that the malice which the Court defines as a deliberate intention to falsify or a malevolent desire to injure is, after all, a largely subjective standard. The dissent further comments (pg. 71-72) that the Court in this case has changed prior decisions by allowing the states to protect a persons reputation from words uttered in a labor dispute.

As was previously noted in the majority holding in *Linn* the state remedies for libel in labor disputes were available where complainant could show the defamatory statements were circulated with malice and caused him harm. There is no constitutional requirement as to the standards enunciated in *New York Times* v. *Sullivan,* 376 U. S. 254 (p. 65). The *New York Times* standards adopted by analogy are applied to effectuate the statutory design with respect to pre-emption. The decision in *Linn* (pg. 67) concludes with this sentence:

> "We deal here not with a constitutional issue but solely with the degree to which state remedies have been pre-empted by the Act."

It follows as was concluded by the Supreme Court of Virginia that state remedies were to be applied. The proceedings in the state court was conducted under the state procedures, the Appellants were given a qualified privilege and the jury was told that there could be no recovery unless actual malice were proved, which was defined in accord with the Virginia procedures.

In "Restatement of Torts" § 599: "One who publishes false and defamatory matter of another upon a conditionally privileged occasion is liable to the other if he abuses the occasion."

Under this section of the restatement of torts, abuse

of this privilege is defined among other things as publishing matter for some purpose other than that for which the particular privilege is given. Here the "Union" members had a right to know who their fellow members were. This was the right that was privileged. Using this privilege the "Union" through the article sought to coerce the Appellees into joining the "Union". Clearly this act of coercion was not the purpose for which the communication was privileged. In using the article for this purpose it abused its privilege and is liable to the Appellees for so doing.

In *R. H. Bouligny Inc.* v. *U. S. Steel* 383 U. S. 145 it was held that jurisdiction for libel committed by Union during a labor dispute did not lie in the United States Courts but in the State Courts. Upon trial in the State Court North Carolina 154 S. E. 2nd 344, 356, it was held that the National Labor Relations Act does not take away this State (N.C.) jurisdiction to entertain and determine according to laws of this state actions for libel published by Union in course of an organizing campaign. Judgment for plaintiff may be rendered, if plaintiff alleges and proves actual malice sufficient to overcome the qualified privilege allowed Union by laws of this State and some actual damages resulting from libelous publication. With this modification, the rules of law applicable to trial of suits for libel generally in the Courts of North Carolina were held applicable to trial of such libel action.

In *San Diego Building Trades* v. *Garmon*, 359 U. S. 236, in determining pre-emption in any given labor case the State power is not precluded where challenged conduct is neither protected nor prohibited under the Federal Act.

In *Greenbelt Pub. Assn.* v. *Bresler*, 398 U. S. 6 (1970) malice was defined to include "spite, hostility or deliberate intention to harm and *that malice could be found from the language of publication itself.* The Court stated:

> "This definition of malice is *Constitutionally* insufficient where discussion of public affairs

> is concerned * * * Even where the utterance is false the great principle of Constitution which secures freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood."

It should be observed that in all the cases referred to as requiring proof of knowing or reckless falsehood; *Rosenblatt* v. *Baer,* 383 U. S. 75 (1966); *New York Times Co.* v. *Sullivan,* 376 U. S. 259 (1964); *Curtis Publishing Co.* v. *Butts;* 388 U. S. 130 (1967); *Thornhill* v. *Alabama,* 310 U. S. 88 (1940) were cases governed by Constitutional prohibition. As previously stated in *Linn* there is no Constitutional prohibition involved in libel by Union during a labor dispute.

The trial court in the case at bar in its instructions to the jury told them the occasion on which the statements were made was a privileged occasion and Appellants are not liable unless they abused such privilege and that Appellees in order to recover must prove actual malice and that the defamatory statements caused them damage, that the words must be construed according to usual construction and common acceptation under the circumstances, that is a labor dispute. The Court defined actual malice as conduct which shows that in printing words they were actuated by sinister or corrupt motive such as hatred, ill will or desire to injure Appellees or communication made with gross indifference or recklessness as to amount to a wanton or wilful disregard of the rights of Appellees.

The Appellants have never asserted by plea or otherwise that the words were true. Falsity was never an issue for in the absence of a plea of truth a presumption that they were false attaches. *Williams Printing Co.* v. *Saunders* 113 Va. 156; *James* v. *Powell* 154 Va. 96; *Carpenter* v. *Meredith* 122 Va. 446. Privilege is an affirmative defense and the ultimate facts upon which Appellants claim that it cannot be held liable in damages for a false statement, otherwise actionable must be alleged in the answer, *R. H. Bouligny, Inc.* v. *United Steel-*

workers,. Appellants did not assert in their defense lack of knowledge as to falsity of the statements published but elected to proceed on the theory that the statements were merely rhetorical hyperbole and not statements of fact, an issue the jury resolved against them. The Appellants say now as they did at the trial, that no one would have taken these charges seriously, that they were merely rhetorical hyperbole. Appellants in circulating the charge certainly knew they were false for they contend they were intended as a figure of speech and assert no one would have taken same seriously. Even were the *New York Times* standard applicable, under the circumstances of this case, Appellants in circulating the charges were aware same were false. In fact so much so that they assert now as they have throughout the proceeding no one would have taken same seriously. It also follows that Appellants circulated same without regard as to whether false or not. What was printed of Appellees was in fact a calculated falsehood, and the fact Appellants say this was a figure of speech, not to be taken seriously, does not make it any the less libelous, when the words do in fact make libelous charges. The jury was instructed as to circulating same in reckless disregard of rights of Appellees. Under the circumstances of this case State Jurisdiction was not preempted. The instructions in accord with the Virginia law were under the facts and evidence sufficient, whatever standard is applied. Appellants refer to *Greenbelt Pub. Assn.* v. *Bresler*, 398 U. S. 6 (1970). This case, as previously pointed out, is a case where a constitutional prohibition was involved and while the Judge defines malice as spite, hostility and deliberate intention to harm he also instructed Jury that malice could be found from the language of publication itself. The Court in holding this definition *constitutionally* insufficient points to that part of instructions permitting malice to be found from the language of publication itself. Since Jury could under this instruction have found malice from the language itself the definition was not constitutionally sufficient. In the

instant case, the Court defined the necessity of proving actual malice and did not tell the Jury they could find malice from the language of the publication itself. Thus even were a constitutional prohibition applicable the instructions under particular circumstances of this case were sufficient.

B. Appellants Assert The Court Below Erred In Holding The First Amendment Inapplicable.

It is contended by Appellants that the *New York Times* standard as to free speech is applicable as in their view this was an issue of general or public interest and the constitutional limitations of the First Amendment is thereby applicable.

Factually aside from being an effort of "Union" by coercion to compel Appellees to join "Union" no labor dispute was involved. All except a handful of the carriers at the Richmond Post Office were already members of "Union". There was in progress at the time no organizing campaign as such. "Union" was already certified and there was no question as to certification raised at that time, no labor dispute between "Union" and Management was involved, no violence, no picketing and no disturbance of any kind. There was no publicity and the public had no interest whatsoever in whether Appellees joined "Union" or not. Appellees were in fact almost complete unknowns, their failure to join "Union" was unknown to Public and there was no general interest or public concern as to their lack of membership. Solely on the basis that efforts to persuade certain non members to join "Union" might in a very broad sense constitute under some definitions a labor dispute. "Union" asserts this became a matter of general or public interest, so as to make the *New York Times* standard applicable.

In *Linn* the Court specifically rejected adoption of the *New York Times* standard under any constitutional compulsion. It is now contended that this standard is applicable by reason of the broadening of the *New York Times* rule to "public figures" in *Curtis Publishing Co.* v. *Butts*, 388 U. S.

130, and in *Rosenbloom* v. *Metromedia,* 403 U. S. 29, to include private individuals where a statement in a radio broadcast concernd an issue of public or general interest.

It would indeed be stretching the decision in *Rosenbloom* beyond all reasonable limits to hold that the fact a handful of postal carriers had failed to join "Union" that this was an issue of public or general interest. It makes little difference whether efforts of "Union" to induce them to join is classified as a labor dispute or not for it was not a matter of public or general interest and the decision of the individuals was certainly a personal one to them. What possible interest could the public have in whether they joined or not, and wherein could it be said this is a matter of general interest within the definition and intendment of *Rosenbloom.*

"Union" contends that this falls within their right to communicate about a matter of concern to members of a special audience. It is one thing however to say that one has a right to communicate to a "special audience" it is something else again to say that what one conveys or has a right to convey to a special audience thereby becomes a matter of public or general interest. The two terms are not synonymous but are directly conflicting, for special audience does not mean general or public but would seem to be the exact opposite.

See *Cantwell* v. *Conn.* 310 U. S. 296 (1940) wherein this Court stated that resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution. This was also stated in *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942). Appellants contend that while Appellees have a right to refuse to join "Union" that "Union" has a right to identify the non members to the members. We do not quarrel with their right to identify the Appellees as non members, however we do say that they do not have the right to do so by means of vicious, scurrilous and libelous attacks upon them, nor does it give them the right to use coercive tactics. None of the cases referred to indicate that "Union" possesses any such right.

The facts here are greatly different from those in

Rosenbloom v. *Metromedia.* Whether Appellees joined "Union" or not was certainly a matter of less than general concern. While organization and maintenance of "Union" may be a matter of general interest, a dispute between a well established labor organization and a non union worker lacks the necessary social and economic significance to be termed matters of general concern.

Senn v. *Tile Layers,* 301 U. S. 468 (1967) is no authority in this situation as to what constituted a labor dispute. The Court stating determination of what was a labor dispute under the statute of Wisconsin was a matter for the Wisconsin Courts (pg. 477); and what constitutes a labor dispute within the State statute does not determine what constitutes a labor dispute elsewhere. *Senn* does not hold Union could make known the facts of a labor dispute because of Freedom of Speech protected by First Amendment as contended by Appellant on page 19 of their brief. The sole purpose of Union says the Court was to acquaint the public with the facts and by gaining support induce *Senn* to unionize.

In *Rosenbloom* v. *Metromedia* it is stated that a matter of public or general interest cannot suddenly become less so because a private individual is involved. The Court goes on to state, the public focus is on the conduct of the participant, and the content, effect and significance of the conduct, not the participants prior anonymity or notoriety. In a footnote p. 44 the Court states:

> "We are not to be understood as implying that no area of a persons activity falls outside the area of public or general interest. We expressly leave open the questions of what constitutional standard of proof, if any, controls the enforcement of state libel laws for detamatory falsehood published or broadcast by the News media about a persons activity not within the area of public or general concern."

Even where labor disputes become matters of public or general concern it is difficult to see that whether a particular employee had elected to join Union or not is within the area of public concern.

While under a broad definition a labor dispute may be a matter of public interest and concern, particularly where such a dispute might shut down the postal service. Yet there must be areas in the broad definition of a labor dispute within which the public has no interest and which are not matters of general concern. The sole labor dispute in the instant case was the fact Appellees had elected not to join "Union". There was no other dispute. Appellees submit that their decision as to joining was private and is outside of the area of public or general concern.

II. APPELLANTS ASSERT THE PUBLICATION IN ISSUE IS PROTECTED AGAINST STATE COURT DAMAGE SUITS BY THE FIRST AMENDMENT AND NATIONAL LABOR LAW.

A. Appellants Assert Since Appellees Alleged No Facts Showing Defamatory *Falsehood, New York Times* Protects The Publication.

The essence of "Unions" argument here is that the article published of and concerning the non members was nothing more than colorful rhetoric and hyperbole. The contention being that the publication in issue contains but one statement of fact that Appellees were non members of "Union". Careful distinction must be drawn between those cases cited, wherein the language used was a class indictment and not directed against a specified particular individual and the case before this Court wherein the publication was directed against specified individuals by name. "Union" says the publication imports no statement of fact except that the individuals were non members of "Union". Accusing the Appellees of having "rotten principles", of

"lacking character", and of "committing the crime of treason" may be construed as statements of fact which from their usual construction and common acceptation in the circumstances under which they were uttered are susceptible of being defamatory. "Union" would relate what was said to characterization pertaining to an entire class, however in so doing they fail to mention that the published description of a "Scab" was applied specifically to each of the Appellees by name. It is not the use of the word "Scab" that constitutes the libel in this case it is attributing to each of the Appellees by name the defamatory description.

For words to be considered as defamatory and actionable it is not necessary that the defamation charge be in direct terms. It may be made by inference, implication, innuendo or insinuation, *Carwile* v. *Richmond Newspapers,* 196 Va. 1 (1954) at page 7; *James* v. *Powell,* 154 Va. 96.

Throughout Appellants brief appears the contention that the defamatory article was mere hyperbole. It is contended that there is nothing factual therein. Appellants select parts such as the description of a scab as having a corkscrew soul, a water brain, a back bone of jelly and glue. They say no one would take this seriously and that it is merly colorful hyperbole. To say one has a corkscrew soul, a water brain, a back bone of jelly and glue carries an implication of a derogatory nature such as corkscrew soul and water brain carry an implication of lack of ability to make positive or firm decision and a backbone of glue and jelly, carries a meaning of lack of character and lack of intestinal fortitude. However, what about the statement "He carries a tumor of rotten principles". To say this of a person is certainly a libelous statement of fact. So much so, that even the Secretary of the "Union" local testified that he thought they had rotten principles. Again the article compares a scab to Judas, who is termeda gentlemen compared to a scab. It being stated the scab does not have character

enough to hang himself. Certainly lack of character is a statement of fact. The Appellees are finally compared to Esau, Judas and Benedict Arnold and accused of being traitors to their God, their country, their family and class.

For language such as the foregoing "Union" asks constitutional protection. This in the face of this Courts holding in *Linn* that malicious libel enjoys no constitutional protection in any context. "Union" in asserting that the language used constituted nothing but rhetorical hyperbole ignores the actual accusation directed against each of the Appellees.

Testimony at the trial clearly shows that the reason Appellees did not join the "Union" was because it was a matter of principle to them.

In "Restatement of Torts" §565: "A defamatory communication may consist of a statement of fact."

> "To be defamatory under the rule stated in this section it is not necessary that the accusation or other statement be by words. It is enough that the communication be reasonably capable of being understood as constituting a charge of a specific act or ommission. Thus, another may be defamed by a statement that he associates with persons of notoriously disreputable character or by attributing to him the characteristics of literary or historical figures of ill repute."

In *Youngdahl* v. *Rainfair*, 355 U. S. 131, (1957) petitioners urged that abusive language such as scab and variations thereof were constitutionally protected. The Court citing *Chaplinsky* said it could not agree. Words can become so coupled with conduct as to provoke violence:

> "If a sufficient number yell any word sufficiently loudly showing intent to ridicule, insult or annoy, no matter how innocuous the dictionary definition of that word, the effect may cease to be persuasive and become intimidation and incitement to violence."

B. Appellants Assert The Very Statements In Issue Have Been Held Protected Under National Labor Policy.

Appellants in their brief at page 33, incorrectly cite the *Clay Products Co.* 106 NLRB 267 (1953). True, the National Labor Relations Board did hold the dissemination of a leaflet containing the Jack London definition of a "scab" was "permissible". However, in its statement, the Court was referring to a single incident reported in *H. N. Thayer Co.;* 92 NLRB 1122 at page 1217. In that case, seven union members visited the home of a non-union employee during a labor dispute. While six of the union members milled around on the sidewalk in a show of strength, the remaining member placed a leaflet containing the article on the doorstep of the non-union employee's home. There was no violence involved in this act. The Board was confronted with the question of whether or not the acts of the seven union members in their mass visit to the non-union employee's home constituted such acts of violence as to deny these seven people reinstatement of employment. The Board held that their acts were not illegal. This decision was in light of similar incidents where those union members who remained out on the street carried lead pipes and shouted threats to the non-union employee being visited.

Obviously, the activity that was held to be "permissible" was the peaceful visit and not the Jack London article itself. It was only incidental to the Board's ruling that the leaflet contained the Jack London article in question. Even if the Board did give consideration to the article, nowhere in either the *Cambria Clay Products* case or the *H. N. Thayer* case was any specific employee's name ever mentioned in connection with the Jack London article defining the term "scab".[1] There, the use of this

[1] On page 53 of the Appendix where Mr. Fiester, a union leader for over 30 years and President of the International Labor Press Association AFL-CIO, on cross-examination by Mr. Kapral, stated that he had never seen the Jack London article appear listing certain person's names.

article could only be intended as a broad class indictment as it was not directed toward any individual nor was it used to injure any specific employee in his relationship and reputation with his fellow employees with the ultimate goal being to coerce him into joining the union.

The Appellees would point out that the cases cited from the National Labor Relations Board are not particularly controlling in the case at hand. The purpose and construction of the National Labor Relations Board is to insure the industrial peace of the nation. Although the Board has an interest in the individual, its major concern is regulating the relationship between organized labor and management as a whole. For this very reason, state courts have not been preempted from adjudicating the rights of individuals such as the Appellees. The question of defamation properly remains within the jurisdiction of state courts whose trier of fact is best able to make the proper determination in defamation suits.

> "Nor should the fact that defamation arises during a labor dispute give the Board exclusive jurisdiction to remedy its consequences. The malicious publication of libelous statements does not in and of itself constitute an unfair labor practice. While the Board might find that an employer or union violated § 8 by deliberately making false statements, or that the issuance of malicious statements during an organizing campaign had such a profound effect on the election as to require that it be set aside, it looks only to the coercive or misleading nature of the statements rather than their defamatory quality. The injury that the statement might cause to an individual's reputation – whether he be an employer or union official – has no relevance to the Board's function. Cf. Amalgamated Utility Workers v. Consolidated Edision Co., 309 U. S. 261 (1940). The Board can award no damages, impose no penalty, or give any other relief to the defamed individual.
>
> "On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation. The Board's lack of concern with the "personal" injury caused by

malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for the pre-emption."[2]

Appellees contend that the subject of this case is of mere peripheral concern to the National Labor Relations Laws. There was no congressional indication that the Federal labor laws were intended to deprive the states of their power to protect the individual in the security of his reputation. *International Association of Machinists v. Gonzales,* 356 U. S. 617 (1958).

Therefore, the determination by the National Labor Relations Board as to use of the Jack London article under the foregoing circumstances has no bearing to the particular facts of this case where the article was directed at these specific Appellees by name in order to injure them in their reputation and to ostracize them from their fellow employees.

III. APPELLANTS ASSERT THE STATUTE IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE

The Appellants in contending that the Virginia Statute is unconstitutional for overbreadth rely upon *Gooding* v. *Wilson,* 405 U. S. 518 (1972) wherein a Criminal Statute of the State of Georgia was held unconstitutional. This decision by a divided Court with two members not participating, turns upon the construction placed upon the Statute by the Georgia Courts and upon the Criminal aspect of the statute involved. The Supreme Court of Virginia has held that a civil action brought under Code Section 8-630, the insulting words statute, is one for libel and slander and the common law rules for slander are to be applied even though the language used is defamatory on its face. *M. Rosenberg & Sons* v. *Craft,* 182 Va. 512; 528; 29 S. E. (2nd) 375, 382-83 (1944). *Carwile* v. *Richmond Newspapers, Inc.;* 196

[2] *Linn v. United Plant Guard Workers,* 383 U. S. 53 (1966)

Va. 1, 6 , 82 S. E. 2nd 588, 591 (1954) *Shupe* v. *Rose's Stores, Inc.* 213 Va. 374. The gist of an action under the Virginia Statute of Insulting Words is the insult to the feelings of the offended party, *Cook* v. *Patterson Drug Co.* 185 Va. 516, and the insult is the basis for the action; *Brooks* v. *Calloway;* 12 Leigh (39 Va.) 466. The criminal statute in the *Gooding* case was held unconstitutional as being vague and overbroad because it had not been narrowed by Georgia Appellate Courts to apply only to fighting words which by their very utterance – "tend to incite an immediate breach of peace."

The Virginia Statute of Insulting Words as do similar statutes in most of the states, exist independent of any labor dispute. The constitutionality of such statutes has been accepted by the Courts over the years. See "Corpus Juris Secundum Constitutional Law," Vol. 16, 213 (2) citing in support of the general rule that defamatory utterances are not within the area of constitutionally protected speech and citing: *Roth* v. *U. S.* 77 Sp. Ct. 1304; 354 U. S. 476; 1 L. Ed. 2nd 1498, rehearing denied 78 Sp. Ct. 8; 355 U. S. 852 *New York Times Co.* v. *Sullivan,* 84 Sp. Ct. 710; 376 U. S. 254. *Linn* v. *Plant Guard Workers of Am. Local 114;* 86 Sp. Ct. 667; 383 U. S. 53.

The difficulty of defining libel has often been referred to and it has been said that attempts to define libel although practically innumerable have never been so comprehensive and accurate as to comprehend all cases that may arise. "Corpus Juris Secundum Libel and Slander. Vol. 53, Sec. 1." In the interpretation of words "slanderous" under the Virginia Statute of Insulting Words the Common Law rules for slander are to be applied. The foundation of such actions for defamation is the injury done to reputation; that is injury to character of an individual whereas in *Gooding* the foundation upon which criminal action was based was fighting words which tend to incite an immediate breach of peace and the failure to define these words resulted in the statute being declared unconstitutional.

In addition to overbreadth it is contended that the Virginia Statute of Insulting Words Virginia Code 8-630 is also void for vagueness. In *Coates* v. *Cincinnati;* 402 U. S. 611 relied upon by Appellants, the use of word "Annoy" in connection with a criminal offense making it unlawful to assemble on the sidewalks in a manner annoying to people was vague because it subjected right of assembly to an unascertainable standard of conduct; for what may be annoying to one person may not be annoying to others. The value protected by libel laws are (1) the desire of the individual to preserve a certain privacy around his personality from unwarranted instrusions and (2) a desire to preserve his public good name; *Rosenbloom* v. *Metromedia;* 403 U. S. 29. It has been held that society has a strong interest in preventing and redressing attacks on reputation. *Rosenblatt* v. *Baer;* 383 U. S. 75, 87.

The injury in libel and slander is to the feeling and reputation of the individual. In *Rosenblatt* v. *Baer;* 383 U. S. 75, 93, Justice Stewart in note on page 93, refers to the following:

> "Civil actions for slander and libel developed in early ages as a substitute for the duel and a deterrent to murder. They live within the genuine orbit of the common law, and in the distribution of American Sovereignty they fall exclusively within the jurisdiction of the states."

The Statute asserted to be unconstitutional for vagueness as interpreted is but an extension of the common law which is within the jurisdiction of the State.

The objection as to vagueness of this statute and of overbreadth are not applicable under the construction and limitations of the Supreme Court of Virginia.

There is another rule stated in *Broadrick* v. *Oklahoma,* 41 U. S. L. W. 5111 (1973)

> "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied

will not be heard to challenge that statute on the ground that it may conceiveably be applied unconstitutionally to others, in other situations not before the Court."

The language published by the Appellants of Appellees would have been equally defamatory whether treated as common law libel or whether treated as coming under the Virginia Statute of Insulting Words. The Court elected to treat the language as coming under the Statute.

In *Carwile* v. *Richmond Newspapers, Inc.* 196 Va. 1 (1954), it is stated at page 6 as follows:

> "An action for insulting words under Code, § 8-630 is treated precisely as an action for slander or libel, for words actionable *per se*, with one exception, namely, no publication is necessary. The trial of an action for insulting words is completely assimilated to the common law action for libel or slander. . *Darnell* v. *Davis*, 190 Va. 701, 58 S. E. (2d) 68; *W. T. Grant Co.* v. *Owens*, 149 Va. 906, 141 S. E. 860; *Guide Pub. Co.* v. *Futrell*, 175 Va. 77, 7 S. E. (2d) 133 . . . . . .
>
> "At common law defamatory words which are actionable *per se* are: (1) Those which impute to a person the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. (2) Those which impute that a person is infected with some contagious disease, which if the charge is true, it would exclude the party from society. (3) Those which impute to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment. (4) Those which prejudice such person in his or her profession or trade. All other defamatory words which, though not in themselves actionable, occasion a person special damage are actionable . . . . . .

"(2) Although varying circumstances often make it difficult to determine whether particular language is defamatory, it is a general rule that allegedly defamatory words are to be taken in their plain and natural meaning and to be understood by courts and juries as other people would understand them, and according to the sense in which they appear to have been used. In order to render words defamatory and actionable it is not necessary that the defamatory charge be in direct terms but it may be made indirectly, and it matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory. Accordingly, a defamatory charge may be made by inference, implication or insinuation. *James* v. *Powell,* 154 Va. 96, 152 S. E. 539; *Moss* v. *Harwood,* 102 Va. 386, 46 S. E. 385; 53 C. J. S. §9, 10, pp. 46, 47."

It is further stated in *Broadrick* v. *Oklahoma:*

"Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute."

As had been noted by the Supreme Court of Virginia:

"In Virginia we have held that a civil action brought under Code §8.630, the insulting words statute, is one for libel or slander and the common-law rules of slander are to be applied, even though the language used is defamatory on its face. *M. Rosenberg & Sons* v. *Craft,* 182 Va. 512, 528, 29 S. E. 2d 375, 382-83 (1944); *Carwile* v. *Richmond Newspapers, Inc.* 196 Va. 1, 6, 82 S. E. 2d 588, 591 (1954); *Shupe* v. *Rose's Stores, Inc.* 213 Va. 374, _____S. E. 2d_____, this day decided."

". . . . . Under our construction and limitations of Code § 8-630, only those words which are not protected by the First Amendment are actionable under the statute."

IV. APPELLANTS ASSERT THE DAMAGE AWARD WAS EXCESSIVE

In *Linn v. Plant Guard Workers,* this Court laid down a test for the determination of the question of damages. That test being that in order for a Plaintiff to collect damages, he must show proof of harm such as general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law. In determining damages, the jury may consider all of these factors. The duty of the Court to examine the damages that have been determined by a jury as to whether or not the amounts are excessive arises only in the most extreme cases where the amount of damages is indeed outrageous and all mankind at first blush may think so. *VanLom v. Schneiderman,* 210 P. 2d 461.

It is for the jury as the trier of fact in the first instance to determine the amount of damages that are to be awarded. Only when the jury abuses its discretion in this matter is the Court called upon to review the amount awarded. The Court may not use its power of review in the name of correcting an abuse of discretion to make the findings of a jury a nullity.

In the case at hand, the Appellees suffered general injury to reputation without question. They experienced conseauent mental suffering in that they testified before the jury that because of working in a hostile atmosphere and then suffering social indignities and people introducing them as "scabs" caused tension resulting in severe migrane headaches. Further testimony before the jury showed that they experienced alienation of associates. Austin testified that he had associated with his fellow employees for 14 years and only when this article was published did they refuse to associate with him. Ziegengeist experienced not only alienation from fellow employees but also marital strife and family discord as a direct result of this article. Brown stated that he was made the object of ridicule by formerly friendly co-workers. The record further shows that pecuniary loss occurred as a result of this article in that loss of time from work was testified to before the jury.

The jury after carefully considering the evidence,

for which the test in *Linn* calls; determined in their best judgment an adequate amount of damages. Professor Newell in his treatise on slander and libel says:

> "The amount at which general damages are to be assessed lies almost entirely within the discretion of the jury . . . . A new trial will only be granted if the verdict is so large as to satisfy the Court that it was perversely in excess, or the result of some gross error on a matter of principle; it must be shown that the jury either misconceived the case or acted under the influence of undue motives." *Newell on Slander and Libel*, pg. 1026 - § 997 DAMAGES - IN THE DISCRETION OF JURY.

Appellees contend that the jury properly considered all of the elements of the test as laid out in the *Linn* case and arrived at a just verdict.

Appellants would have this Court reduce the compensatory and punitive damages, upheld by the Supreme Court of Virginia, to an amount commensurate with the maximum $500.00 fine as provided for in Virginia's Criminal Law Section of its Code. With this we cannot agree in that the two cannot be compared. By their very nature, punitive damages serve a purpose of deterrence which the criminal law fine of $500.00 cannot begin to fulfill. One must bear in mind that we are dealing here with three low ranking postal employees who have been damaged by a multi-million dollar national union.

In assessing the amount of exemplary damages the Jury was entitled to take into consideration the malice or wantonness of the act complained of, and all the circumstances that go to aggravate the case. They were entitled to consider the station of the parties and the size and financial standing of the Appellants. There was no apology, either prior to or at the trial, and the

Appellants took the position that none would be made. The publication was made after one of the Appellees had protested prior publication of his name as a "Scab". Aggravation and malice were shown to a high degree as well as a preconceived and concerted effort to use this as a means of compelling Appellees to join "Union". There was an utter and reckless disregard of the rights of Appellees to enjoy the peaceful pursuit of their employment. There was present here ill will and evil motive.

An award of $100,000.00 as punitive damages against a Union because of actions of its agents in attempting to prevent employees from proceeding with their work unles they joined the Union, has been held, not excessive.

> "The general rule is that there is no fixed standard for the measurement of exemplary of punitive damages and the amount of the award is largely a matter within the discretion of the Jury." *United Constr. Workers* v. *Laburnum Constr. Corp.* 194 Va. 872.

This award was approved by the Supreme Court of United States; *United Constr. Workers* v. *Laburnum Constr. Corp.* 347 U. S. 650 and in *Automobile Workers* v. *Russell*, 356 U. S. 634 at page 646 the Supreme Court of United States stated:

> "Punitive damages constitutes a well settled form of relief under the law of Alabama * * * In Laburnum (*United Workers* v. *Laburnum*, supra), we approved a judgment which included $100,000.00 in punitive damages."

In light of these facts, neither the compensatory damages of $10,000.00 per man nor the punitive damages of $45,000.00 per man are excessive.

CONCLUSION

For the reasons stated the judgment of the Supreme Court of Virginia should be affirmed.

Respectfully submitted,

PARKER E. CHERRY, ESQ.
PURCELL, CHERRY & KERNS
1012 Mutual Building
Richmond, Virginia 23219

STEPHEN M. KAPRAL, ESQ.
DEAL AND KAPRAL
4510 S. Laburnum Avenue
Richmond, Virginia 23231

August 31, 1973

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief For The Appellees have been served on or before the 4th day of September, 1973, by first-class mail, postage prepaid, upon:

MOZART G. RATNER
GEORGE B. DRIESEN
818-18th Street, N. W.
Washington, D. C. 20006

ISRAEL STEINGOLD
819 Citizens Bank Building
Norfolk, Virginia 23514

JERRY D. ANKER
1730 M. Street, N. W.
Washington, D. C. 20036

ATTORNEYS FOR APPELLANTS

J. ALBERT WOLL
General Counsel, AFL-CIO
ROBERT C. MAYER
LAURENCE GOLD
736 Bowen Building
815 Fifteenth Street, N. E.
Washington, D. C. 20005

THOMAS E. HARRIS
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N. W.
Washington, D. C. 20006

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

RUTH JANE ZUCKERMAN
505 West End Avenue
New York, New York 10024

ATTORNEYS FOR AMICUS CURIAE

All parties required to be served have been served in accordance with Rule 33 of the Rules of the Supreme Court of the United States.

PARKER E. CHERRY
STEPHEN M. KAPRAL